9-1700-9668-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN RIGHTS

Saundra Spigner,

Complainant,

v.

Hennepin County,

Respondent.

ORDER DENYING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

The above-entitled matter is before Administrative Law Judge Phyllis A. Reha on Respondent's motion for summary disposition. The record on this motion closed on May 24, 1996, with the receipt of the Respondent's reply memorandum.

Cheri Sudit, Assistant County Attorney, Suite 2000 Government Center, Minneapolis, Minnesota 55487, filed the Motion on behalf of Respondent, Hennepin County. Sonja Dunnwald Peterson, Horton and Associates, 700 Title Insurance Building, 400 Second Avenue South, Minneapolis, Minnesota 55401-2402, represents the Complainant, Saundra Spigner.

Based upon the memoranda filed by the parties, all of the filings in this case, and for the reasons set out in the memorandum which follows, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED that:

1. Respondent's motion for summary disposition be DENIED.

Dated: June ___, 1996.

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PHYLLIS A. REHA
Administrative Law Judge

MEMORANDUM

Respondent has moved for summary disposition on two grounds. While not challenging the conduct that forms the basis of the charge, Respondent maintains that

Complainant lacks standing to bring a charge under the Minnesota Human Rights Act (MHRA) because she has not suffered wage loss or pecuniary damages. Respondent also argues that the doctrine of official immunity bars this contested case.

Summary disposition is the administrative equivalent to summary judgment. Minn. Rules pt. 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn. R. Civ. P. 56.03. The Office of Administrative Hearings has generally followed the summary judgment standards developed in judicial courts in considering motions for summary disposition regarding contested cases. *See* Minn. Rules pt. 1400.6600.

It is well established that, it order to successfully resist a motion for summary judgment for the purpose of holding a hearing, the non-moving party must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees Federal Credit Union, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the non-moving party by substantial evidence; general averments are not enough to meet the non-moving party's burden under Minn. R. Civ. P. 56.05. *Id*.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W. 2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). Summary judgment may be entered against the party who has the burden of proof at the hearing if that party fails to make a sufficient showing of the existence of an essential element of its case after adequate time to complete discovery. *Id*. To meet this burden, the party must offer "significant probative evidence" tending to support its claims. A mere showing that there is some "metaphysical doubt" as to material facts does not meet this burden. *Id*.

The MHRA authorizes the administrative law judge to award compensatory damages, punitive damages, a civil penalty to the State, reasonable attorney's fees, and litigation and hearing costs. Minn. Stat. § 363.071, subds. 6 and 7. Further, the administrative law judge is authorized to order reinstatement or upgrading of an employee, participation in training programs, or any other relief the judge deems just and equitable. Minn. Stat. § 363.071, subd. 2. Where a judge finds that a violation of the MHRA has occurred, the judge is required to issue a cease and desist order. *Id*.

The remedies available under the MHRA are far broader than pecuniary damages. There is nothing in the statute to suggest that any person is precluded from obtaining a nonmonetary remedy under the MHRA where there have been no pecuniary damages. Complainant has standing to bring a charge under the MHRA since she is an employee of Respondent and has alleged discrimination in her employment.

Respondent cites State by Beaulieu v. City of Moundsview, 518 N.W.2d 567, 570-71 (Minn. 1994), as requiring a showing of willfulness or malice to overcome the official immunity conferred upon public officials performing tasks that are discretionary. Respondent asserts that there is no evidence that the employee alleged to have discriminated engaged in any willful or malicious conduct in the workplace to support a

claim under the MHRA. Complainant has alleged that the employee made derogatory remarks of both race and gender in reference to Complainant and made employment decisions based on those factors.

The doctrine of official immunity is described in Watson by Hanson v. Metropolitan Transit Com'n, 540 N.W.2d 94, 99-100 (Minn.App. 1995), as follows:

> 2. Official immunity (FN1)
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> "[A] public official charged by law with duties which call for exercise of his judgment or discretion is not personally liable to an individual for damages unless he is guilty of a willful or malicious wrong." Elwood v. Rice County, 423 N.W.2d 671, 677 (Minn.1988) (quoting Susla v. State, 311 Minn. 166, 175, 247 N.W.2d 907, 912 (1976)). The primary purpose of official immunity is "to insure that the threat of potential personal liability does not unduly inhibit the exercise of discretion required of public officials in the discharge of their duties." Holmquist, 425 N.W.2d at 233 n. 1. Law enforcement officers may be protected by official immunity. Elwood, 423 N.W.2d at 678.
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> [13][14][15] Official immunity involves discretionary decisions made on an operational, rather than a policymaking, level. Pletan [v. Gaines], 494 N.W.2d at 40. Operational decisions are "something more than the performance of 'ministerial' duties." Id. Ministerial duties are "absolute, certain and imperative, involving merely the execution of a specific duty arising from fixed and designated facts." Cook v. Trovatten, 200 Minn. 221, 224, 274 N.W. 165, 167 (1937), quoted in Elwood, 423 N.W.2d at 677. Police officers are not generally "ministerial officers," because their duties are often executive in nature and involve discretionary decisions. Elwood, 423 N.W.2d at 678. "Whether an officer's conduct merits immunity nevertheless turns on the facts of each case." *Id*. An emergency is not essential for official immunity to apply. Duellman v. Erwin, 522 N.W.2d 377, 380 (Minn.App.1994), *review denied* (Minn. Dec. 20, 1994).

There are no duties identified in this matter that are required to be protected with the doctrine of official immunity. Respondent cites no support for finding that acting as a supervisor is, without more, one of those discretionary duties that fall within the protection of the official immunity doctrine. To the contrary, there are a number of public employer cases under the MHRA and none have been dismissed under the doctrine of official immunity. *See* State by Cooper v. Hennepin County, 441 N.W.2d 106 (Minn. 1989); Rutherford v. County of Kandiyohi, 449 N.W.2d 457 (Minn.App. 1989), *review denied* (discharge of probation officer); Sigurdson v. Isanti County, 386 N.W.2d 715 (Minn. 1986); Klink v. Ramsey County, 397 N.W.2d 894 (Minn.App. 1986); State by Cooper v. Mower County Social Service, 434 N.W.2d 494 (Minn.App. 1989).

One public employer case that was cited is Rico v. State, 472 N.W.2d 100, (Minn. 1991), where an unclassified employee was removed and the employee claimed the removal was retaliatory in violation of 42 U.S.C. Sec. 1983. The Supreme Court analyzed the claim of official immunity as follows:

> Official immunity also differs from governmental immunity in that the official immunity doctrine does not protect the officer who commits a wilful or malicious wrong. Compare Elwood, 423 N.W.2d at 679 with Minn.Stat. Sec. 3.736, subd. 3(b) (1990). Malice "means nothing more than the intentional doing of a wrongful act without legal justification or excuse, or, otherwise stated, the willful violation of a known right." Carnes v. St. Paul Union Stockyards Co., 164 Minn. 457, 462, 205 N.W. 630, 631 (1925) (malicious interference with employment); see also Johnson v. Radde, 293 Minn. 409, 410, 196 N.W.2d 478, 480 (1972) (malice as grounds for punitive damages); Sorenson v. Chevrolet Motor Co., 171 Minn. 260, 264, 214 N.W. 754, 755 (1927) (malicious interference with contract); Lammers v. Mason, 123 Minn. 204, 205-06, 143 N.W. 359, 360 (1913) (malicious prosecution). (FN5) In the official immunity context, wilful and malicious are synonymous.

Id. at 107.

Although the Court in Rico held that official immunity applied, that holding was based on unsettled law at the time of the action and the position held by the employee as unclassified and having significant policy-making duties. Neither of those circumstances are present in this matter. The duties of the Complainant are strictly set by the Respondent and the position she holds is classified. The duties of the employee alleged to have discriminated are, as far as supervision of Complainant is concerned, strictly set by the Respondent and do not involve significant policy-making duties. There is no basis for holding officical immunity applies to this matter under the holding in Rico.

Even if the doctrine of official immunity can be applied here, the expression of derogatory remarks specific to categories protected by the MHRA is sufficient showing of willfulness or malice to meet the Moundsview standard for overcoming the doctrine. City of Minneapolis v. Richardson, 239 N.W.2d 197, 203 (Minn. 1976)(“When a racial epithet is used to refer to a person of that race, an adverse distinction is implied between that person and other persons not of his race”). Since the evidence must by taken in a light most favorable to the nonmoving party, there is evidence that the discrimination alleged was willful or malicious and official immunity cannot be applied to bar a hearing on this matter.

The conduct protected by the doctrine of official immunity is discretionary conduct involving a duty to the public. *See* Richardson, at 202. Regarding other conduct, the Supreme Court stated:

> It should be kept in mind that whether official immunity applies to a particular alleged Human Rights Act violation depends on the nature of the governmental duty being discharged by the defendants. If a government employee should commit an act of discrimination during the performance of a ministerial duty, official immunity would not apply.

State by Beaulieu v. City of Mounds View, 518 N.W.2d 567, 571 (Minn. 1994)

The Court of Appeals has identified the standard to apply to determine if the exercise of discretion is afforded the protection of official immunity as follows:

> The center's investigation and disciplinary decisions involved the type of legislative or executive policy decisions that we believe must be protected by discretionary immunity. The center's decisions did not simply require the application of professional judgment to a given set of facts, but were necessarily entwined in a layer of policy-making that exceeded the mere application of rules to facts.

Oslin v. State, 543 N.W.2d 408, 416 (Minn.App. 1996).

There is no policy-making involved in a supervisor making employment decisions on the basis of race or gender, as alleged by Complainant. Such conduct is well-established to be contrary to law and has been so for many years. The evidence tending to support the claim of discrimination shows that a genuine issue of material fact exists as to whether Complainant's supervisor discriminated against her on the basis of her race and gender. A genuine issue of material fact exists as to whether such conduct, if proven, was willful and malicious. Respondent's motion for summary disposition must, therefore, be DENIED.

P.A.R.